Supreme Court, U.S.
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No. ——

IN THE
SUPREME COURT OF THE UNITED STATES

Nell Neinast,

Petitioner,

v.

State of Texas; Texas Department of Transportation; David M. Laney; Robert Nichols; John W. Johnson; Charles W. Hald; Jerry Dike; Vehicle Titles and Registration Division,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Eleventh Amendment bar suits by private citizens in federal court for violation of the Surcharge Prohibition Regulation [28 C.F.R. §35.130(f)] which prohibits the addition of any fee or monetary charge as a condition to one's receiving the rights and benefits mandated by the Americans with Disabilities Act ("ADA")?[1]

---

[1] The Court has now three times granted certiorari to determine the constitutionality of the ADA and its validity under the enforcement clause of the 14th Amendment. Two cases have been settled and withdrawn, but one remains pending. *See University of Ala. at Birmingham Bd. of Trustees v. Garrett*, 120 S.Ct. 1669 (2000), 146 L.Ed.2d 479, 68 U.S.L.W. 3491, 68 U.S.L.W. 3654 (April 17, 2000). Oral argument is set for October, 2000.

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Nell Neinast is a citizen and resident of the State of Texas and of the United States. She is one of thousands of handicapped persons required by the Respondents to purchase a handicapped parking placard in order to access handicap parking spaces as mandated by regulations promulgated pursuant to the ADA. Petitioner is an individual and has no corporate affiliation.

Respondents

Respondents are the State of Texas, Texas Department of Transportation, David M. Laney, Robert Nichols, John W. Johnson, Charles W. Hald, Jerry Dike, and Vehicle Titles and Registration Division. These respondents are those officials of the State of Texas charged with carrying out the duties articulated by regulations extant under the ADA to provide the handicapped citizens of Texas equal access to public property while at the same time collecting fees paid by plaintiff and the group of citizens of Texas who qualify for handicapped parking placards under the ADA regulation at issue in this appeal.

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JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 26, 2000. Petitioner timely filed Motions for Panel Rehearing and for Rehearing En Banc. Both Motions were denied on July 26, 2000 and this Writ is filed within 90 days of such denials.

The statutory basis for review by certiorari of a final judgment rendered by United States Court of Appeals which additionally finds itself in conflict with other Federal Courts of Appeal is invoked pursuant to 28 U.S.C. §§ 1254(1), 2101, and 2106 as elaborated in the Rules of the Supreme Court, Part III, Rules 10(a) and (c), 12, 13 and 14.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const.: Secs. 1 and 5 of the Fourteenth Amendment:

> (1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it jurisdiction the equal protection of the laws.
>
> * * *
>
> (5) The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. U.S. Const.: Eleventh Amendment to U.S. Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. Americans With Disabilities Act (ADA), 42 U.S.C. §12132:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity.

4. The Surcharge Prohibition Regulation of the ADA, 28 C.F.R. 35.130(f) (2000):

> A public entity may not place a surcharge on a particular individual with a disability or group of individuals with disabilities to cover the costs of such measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the non-discriminatory treatment required by the Act or this part.

5. Delegation of Authority to the Attorney General and the Department of Justice, 42 U.S.C. §12134(a):

> Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

STATEMENT OF THE CASE

The facts of this case are uncomplicated and undisputed. Petitioner in a class action on behalf of thousands of Texas citizens had sought to recover money damages as well as injunctive relief to prevent the State of Texas and its officials who enforce the Transportation Code of Texas (respondents herein) from surcharging a $5 placard parking fee for handicapped individuals who are granted -- pursuant to the Americans with Disabilities Act, 42 U.S.C. §12132 -- equal accessibility to public buildings and services and designated parking spaces contiguous to those buildings and services. The Fifth Circuit then held the subject surcharge prohibition regulation [28 CFR 35.130(f)] unconstitutional as an unwarranted 14th Amendment intrusion upon the State of Texas' immunity from suit under the 11th Amendment to the U.S. Constitution and affirmed the District Court's dismissal of the complaint, (Opinion App. A at 1a) albeit on different grounds.

It is the language of 28 C.F.R. §35.130(f) that the court below held unconstitutional not because it was "arbitrary, capricious or manifestly contrary" to the ADA as required by *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 844, 104 S.Ct. 2782 (1983), *United States v. Morton,* 467 U.S. 822, 834, 104 S.Ct. 2769, 2775 (1984); *Schweiker v. Gray Panthers*, 453 U.S. 34, 44, 101 S.Ct. 2633 (1981); *Batterton v. Francis*, 432 U.S. 416, 424-426, 97 S.Ct. 2399 (1977), and *ATT v. United States*, 299 U.S. 232, 235-237, 57 S.Ct. 170 (1936), but because -- the appellate court held -- the subject regulation "bars the sharing of <u>any</u> costs of such measures, a highly intrusive limit on the core state power to choose revenue sources." (Opinion at App. A, at 15a) The United States District Court never reached any constitutional issue when it dismissed petitioner's complaint

because it held that the $5 fee was really a tax and, therefore, the action was barred by the Tax Injunction Act, 28 U.S.C. §1341. The Appellate Court reversed on this issue, took jurisdiction and then affirmed because of the intrusion upon Texas' revenue raising power.

The Fifth Circuit had previously found the ADA statutory purpose and scheme to be an appropriate 11th Amendment abrogation in *Coolbaugh v. State of Louisiana*, 136 F.3d 430 (5th Cir., 1998), *cert. denied* 119 S.Ct. 58 (1998), yet found this specific surcharge regulation not appropriate.

The court below skirted the basic concepts required for the proper tests of constitutionality and expressly rejected the established Court standards for analyzing regulations issued pursuant to constitutionally correct Federal equal rights programs, thereby creating its own standards and tests. The court was fixed on the "congruence and proportionality" tests employed by it to focus on the ADA overall (Opinion, App. A at 10a-16a) and added its own test for the subject surcharge prohibition regulation -- a test that perceived the surcharge prohibition regulation as a interference with the revenue raising powers of the State of Texas and for that reason unconstitutional.

> The regulation's scope goes further than simply requiring states to provide access to their facilities and programs; it bars the sharing of <u>any</u> costs of such measures, a highly intrusive limit on the core state power to choose revenue sources. . . . (Opinion, App. A at 15a)

ARGUMENT FOR GRANTING THE WRIT

The language of the this Court is clear as to the judicial inquiry to be made of a regulation issued pursuant to a proper Constitutionally approved statutory program. It is the language not to be ignored by lower courts when enforcing federal programs that are meant to cure tangible evils in our society, such as the inequality of handicapped persons:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. (emphasis added)

Chevron USA, *supra*, 467 U.S. at 843-4 (1984). There is nothing said by this Court about revenue production or cost sharing. As worthy as those concepts are, they have no place in the analysis as to the surcharge regulation, yet the appellate court after approving the ADA as being constitutional in *Coolbaugh, supra*, applied its own constitutionality tests -- not those of this Court -- to the surcharge regulation, while expressly rejecting *Chevron* in favor of a novel "Step 1" and "Step 2" procedure herethereto unknown:

> . . . Chevron can suggest the wrong question if we move too quickly to its second step. Whether the Department of Justice has

> rationally or arbitrarily interpreted the ADA in promulgating the regulation at issue does not answer whether Congress could constitutionally have made a certain policy choice . . . If the statute satisfies this initial inquiry, we then measure whether the challenged regulation operates within the remedial compass defined by Congress through valid use of §5 powers. This means that the agency's action must be proportional and congruent to the relevant constitutional wrongs identified by Congress, not simply to other remedial steps taken by Congress directly . . .

Opinion, App. A. at 13a-14a.

The appellate court did enter a novel door of abrogation and developed its own theories on constitutionality opening the door even more for all appellate courts to apply varied and untried standards. A reminder is in order.

ARGUMENT 1

THE SURCHARGE PROHIBITION REGULATION ISSUED BY THE DEPARTMENT OF JUSTICE AND THE ATTORNEY GENERAL OF THE UNITED STATES PURSUANT TO THE ADA MANDATE SHOULD BE JUDGED SOLELY BY THE SAME STANDARDS OF ARBITRARINESS AS ALL OTHER REGULATIONS REQUIRED TO IMPLEMENT A CONSTITUTIONALLY APPROVED CONGRESSIONAL PROGRAM.

The Fifth Circuit below had anointed the ADA as a proper exercise of Congress' power under §5 of the 14th

Amendment to seek remedies for the denial of rights to handicapped persons. *See Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998), *cert. denied* 119 U.S. 58, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998). Yet after approving the statutory scheme as a whole, the Fifth Circuit then applied a piecemeal, constraining and divisive analysis of a regulations promulgated pursuant to such legislation. To paraphrase the scriptures in the Book of Job, Chpt. 1, Verse 21: With one hand they giveth and with the other hand, taketh away.

Approval of such a "line-item veto" *See Dare v. State of California*, 191 F.3d 1167, 1176 & Fn. 7 (9th Cir., 1999) power over legislation would effectively undermine Congress' authority and power to develop appropriate constitutionally correct aimed at discrimination. The lower courts are not without standards set out by this Court for the determination of the constitutionality of procedures initiated by regulatory bodies to effectively carry out the mandate of Congress in various areas. This Court has said that implementing regulations promulgated pursuant to the plain language of appropriate statutory programs "must be given 'legislative and hence controlling weight unless they are arbitrary, capricious or clearly contrary to the statute.'" *United States v. Morton*, 467 U.S. 822, 834, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984).

To permit the federal courts to revert to another standard -- in this case one that requires the continual, universal inquiry into the "proportionality and congruence" standards enunciated by this Court in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), and adopted by the Fifth Circuit in *Coolbaugh, supra*, -- and to one of varying standards not pronounced by this Court would play havoc with this Courts perception of the continuing needs to require that lower courts further the intent of Congress by seeking clear and active enforcement of

approved statutory schemes without an undue burden on the entire process -- court or litigant alike.

This Court has buttressed its *Morton* reasoning in *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2782 (1984) by articulating the principle of "deference" required when a court examines a regulation under a federal statutory program. The guidance -- ignored in its substance by the Fifth Circuit below -- is set out at 467 U.S. 837-838:

> "'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly by Congress.' *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency or a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

Under any test -- implicit or explicit -- the Fifth Circuit "misconceived the nature of its role in reviewing the regulation at issue." *Chevron, supra*, at 845.

The Court in *Batterton v. Francis*, 432 U.S. 416 set the parameters of court review when express authority is delegated as at bar [*See* 42 U.S.C. §12134(a)] at 432 U.S. 425:

> Unlike the statutory term in Title II, however, Congress in §407(a) expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner. *American Telephone & Telegraph Co. v. Unites States*, 299 U.S. 232, 235-237 (1936).

Lower courts should not be permitted to follow their own dictates under these circumstances. The Fifth Circuit in doing so has decided an important federal question regarding the interpretive standards to be applied by courts when reviewing regulations issued pursuant to correct statutory programs. The Department of Justice having been appointed to fill in the gaps of the ADA issued the "sur-charge" regulation found by the Fifth Circuit not to be arbitrary and capricious but to be un-proportional, incongruent and an interference with revenue raising procedures of the State of Texas, while second-guessing and re-directing Congress and the Department of Justice. For this reason --that is, to maintain the integrity of the judiciaries role in reviewing

regulations which implement constitutionally correct programs -- the Court should grant petitioner's request for certiorari.

ARGUMENT 2

THERE IS A PALPABLE CONFLICT BETWEEN THE FOURTH, FIFTH AND NINTH CIRCUIT AS TO THE CORRECT ANSWER TO THE QUESTION PRESENTED

The decision of the Fifth Circuit permitting a separate and unique analysis of ADA regulations issued under appropriate Congressional mandates further confuses an existing ADA conflict among the circuits in those regards. The Fourth Circuit in *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698, 703-4 (4th Cir., 1999) held that each regulation must meet the proportional and congruent test of *City of Boerne*, *supra*. The Ninth Circuit correctly applies the arbitrary and capricious test of *Chevron* if -- in fact and law -- the statutory scheme is approved. *See Dare v. California*, 191 F.3d 1167, 1176 & n.7 (9th Cir., 1999). As to *Brown, supra*, further confusion was introduced when another Fourth Circuit panel approved both the ADA as a statutory scheme and concurrently approved an individual regulation thereunder -- all by the congruence and proportionality standards. Then the Fourth Circuit vacated its judgment. *See Amos v. Maryland Dept. of Public Safety & Correctional Serv's.*, 178 F.3d 212, 221 & n. 8 (4th Cir. 1999), *reh'g en banc granted, judgment vacated*, December 28, 1999. Somebody is wrong.

ARGUMENT 3

THE ADA PROHIBITS DISCRIMINATION OF ANY SORT. DISCRIMINATION IN THE FORM OF A USE TAX APPLIED TO THE PARTICULAR HANDICAPPED GROUP PROTECTED BY THE ADA IS THE MOST PERVASIVE OF ALL DISCRIMINATION.

This acquiescence by the court below to the $5 placard fee overlooks the requirement set out in the express language of both the ADA Prohibition Against Discrimination and the Surcharge Regulation that there can be no additive -- least of all a financial one -- that disturbs the complete grant of equality of rights and non-discriminatory treatment required by the ADA for handicapped persons. The key phrase and operative concept of discrimination that the court bypassed and absented from its opinion is contained in the core ADA statute, 42 U.S.C. §12132:

> [s]ubject to the provisions of this subchapter, no qualified individual shall, by reason of such disability, be excluded from: participation in or denied the benefits of the services, programs, or activities or a public entity, or be subject to discrimination by any such entity. (emphasis added)

Correspondingly, the implementing surcharge regulation, 28 C.F.R. §35.130(f), which was held unconstitutional by the Fifth Circuit states in pertinent part:

> [a] public entity may not place a surcharge . . . to cover the cost of measures . . . that are required to provide . . . nondiscriminatory

treatment required by the Act or this part. (emphasis added)

The significance of the words "discrimination" and "non-discriminatory" was not found in this court's reasoning nor was any meaning or weight given thereto even though the meaning is plain. This court's reasoning was predicated upon its inability to perceive the connection or nexus between the Texas $5 handicap parking placard charge and the remedy embraced in 42 U.S.C. §12132. Seemingly, nothing could be a clearer connection with the simple concept of discrimination than a financial charge allocated only to those who need pay for their rights -- whether those rights are meant to correct racial, sexual or handicapped inequality.

What the court failed to consider in its opinion was the linkage between the $5 surcharge and the prohibited discrimination or discriminatory treatment proscribed by the ADA and its regulations. Petitioners respectfully suggest that any discrimination of any sort or of any quantum or form is thereby prohibited -- whether it be a $5 charge for equality such as equal access to buildings or a $50 charge. One can't be a little bit pregnant. The use of the word "discrimination" in the statute and the regulation is unambiguous and has a clearly defined meaning.

Congress' remedial authority defined by the ADA and approved as appropriate in the Fifth Circuit countenances all remedies which prevent state actions that erode the ADA even in small measures. The essence of discrimination is found in any state practice which adds a financial imbalance to a protected class of citizens which is not born by all citizens. *Dare v. State of California*, 191 F.3d 1167 (9th Cir. 1999); *Duprey v. Conn. Dept. of Motor Vehicles*, 28 F.Supp. 2d 702

(D. Conn. 1998); *Thrope v. State of Ohio*, 19 F.Supp. 2d 816 (S.D. Ohio 1998).

CONCLUSION

The Court of Appeals' decision in this case is wholly inconsistent with this Court's holdings requiring that agency rules must stand unless they are arbitrary, capricious and clearly contradictory to the Constitutionally approved federal program that spawned them. Such judicial activism and unrestricted discretion as at bar not limited by this Court's pronouncements not only destroys the purpose of congressional intent and permits lower courts to legislate in the courtroom according to ad hoc standards not predictable by Congress or litigant but creates continuing conflicts among the lower courts as to what is the proper constitutional formula. For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed June 26, 2000]

No. 99-50811

NELL NEINAST,
Plaintiff-Appellant,

v.

STATE OF TEXAS; TEXAS DEPARTMENT OF TRANSPORTATION; DAVID M. LANEY; ROBERT NICHOLS; JOHN W. JOHNSON; CHARLES W. HALD; JERRY DIKE; VEHICLE TITLES AND REGISTRATION DIVISION,
Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas

Before REYNALDO G. GARZA, HIGGINBOTHAM, and BENAVIDES, Circuit Judges.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Today we review a challenge under the Americans with Disabilities Act ("ADA") to Texas's fee for handicapped parking placards in light of jurisdictional and immunity defenses by the State. Texas asserts that Nell Neinast cannot bring this suit in federal court because the placard charge is a tax, barring our review under the Tax Injunction Act, 28 U.S.C. § 1341, and because the ADA regulation at issue does not validly abrogate Texas's immunity from suit under the Eleventh Amendment. We hold that the charge is a fee unaffected by the Tax Injunction Act. We also conclude that because an administrative creature of Congress may not have greater power than the Congress to abrogate the states' immunity, a challenged regulation must be proportionate and congruent to the constitutional wrongs identified by the agency's enabling statute. Finding that the regulation does not do so, we hold that Neinast's suit is barred by the Eleventh Amendment.

I

This putative class action[1] seeks injunctive relief and monetary damages for a $5 fee charged by Texas for handicapped placards.[2] These placards enable disabled

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[1] As the district court decided the dispositive motion on review at the outset of the lawsuit, the class has not yet been certified.

[2] See Tex. Trans. Code Ann. §§ 681.002, 681.003.

individuals to park in specially designated parking spaces; an individual need obtain one only if she does not own a car or wishes to ride in the vehicle of a non-disabled individual.[3] The Texas Transportation Code states that the fees will be "deposited in the state highway fund to defray the cost of providing the disabled parking placard."[4] Neinast, who is disabled, paid the five dollar fee and obtained a placard.

Neinast filed suit in federal court, arguing that the fee charged violates an ADA regulation prohibiting a governmental entity from placing a surcharge on an individual with a disability to cover the costs of measures required under the Act.[5] Twenty days after Neinast filed suit, Texas filed a motion to dismiss on the ground that the federal court lacked jurisdiction pursuant to the Tax Injunction Act. The district court granted that motion, and Neinast appealed. On appeal, Texas contends not only that the Tax Injunction Act but also the Eleventh Amendment bars the federal suit.

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[3] If the individual owns a car, she would have a license plate. The handicapped symbol on a license plate also authorizes parking in handicapped spaces, and such license plates cost no more than a regular license plate. See § 502.253(a), (d).

[4] § 681.005.

[5] See 28 C.F.R. § 35.130(f) (2000).

II

First, the question before the district court: whether federal jurisdiction is barred by the Tax Injunction Act.[6] That statute prevents federal courts from enjoining, suspending or restraining the assessment, levy or collection of any tax under state law as long as a plain, speedy and efficient remedy may be had in the courts of that state.[7] The Act functions as a broad jurisdictional impediment to federal court interference with the administration of state tax systems.[8]

The applicability of the Act turns on whether the placard charge is a "tax" or instead a "fee." The leading case in this area, San Juan Cellular Telephone Company v. Public Service Commission, describes the distinction as a spectrum with the paradigmatic fee at one end and the paradigmatic tax

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[6] We first address the statutory jurisdiction question in order to, if possible, avoid a constitutional question. See Vermont Agency of Natural Resources v. United States ex rel. Stevens, 2000 WL 646252 (S.Ct. 2000); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 n.2 (1998) (noting Supreme Court's choice of order between statutory and constitutional jurisdictional questions).

[7] 28 U.S.C. § 1341 (2000).

[8] See Home Builders Assoc. of Miss., Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998).

at the other.[9] The classic fee is imposed (1) by an agency, not the legislature; (2) upon those it regulates, not the community as a whole; and (3) for the purpose of defraying regulatory costs, not simply for general revenue-raising purposes,[10] Whether a charge is a fee or a tax is a question of federal law.[11]

Applying these factors to the Texas statute at hand, we find that the first factor, whether the charge is imposed by the legislature or an agency, suggests that the charge is a tax because it is imposed by the Texas legislature. The second factor, on whom the charge is imposed, suggests that the charge is a fee: the charge is imposed only on a narrow class of persons, disabled people wanting a placard, not the public at large.

The third factor, the ultimate use of the funds, thus becomes our critical question.[12] The relevant provision in the Texas Transportation Code requires that the placard charges go into the general highway fund to help defray the cost of the

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[9] San Juan Cellular Tel. Co. v. Public Serv. Comm'n, 967 F.2d 683, 685 (1st Cir. 1992) (Breyer, C.J.).

[10] Home Builders, 143 F.3d at 1011.

[11] Id. at 1010 n. 10.

[12] See Marcus v. Kansas, 170 F.3d 1305, 1311 (10th Cir. 1999).

program.[13] Texas argues that the funds will more likely provide a benefit to the community in the highway fund than actually defray the cost of the program. According to this interpretation, however, no charges would be fees unless they are funneled into a segregated account. If the costs of the placard program are paid out of the general highway fund, then charges paid back into the fund do help defray the program's costs.

Texas also argues that the charge is a tax because it first goes to the tax collector, then the highway fund. This formalism is unhelpful. The opinion on which Texas relies, Hexom v. Oregon Department of Transportation, specifically rejected this analysis: it declined to characterize the fee based on the initial fund it goes to, observing that the question is not where the money is deposited, but the purpose of the assessment.[14]

The purpose here is described narrowly as being for the benefit of the program itself. This fact distinguishes this case from Home Builders Association of Mississippi, Inc. v. Madison, cited by Texas. There, a municipality imposed an assessment on developers and builders to "pay a fair share of providing and maintaining . . . essential municipal services." The collected funds would be used for a variety of municipal services, including streets, fire and police departments, and parks and recreation.[15]

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[13] Tex. Trans. Code Ann. § 681.005(1).

[14] See 177 F.3d 1134, 1138 (9th Cir. 1999).

[15] Home Builders, 143 F.3d at 1012.

Several recent opinions have examined handicap placard surcharges and found them to be "fees" where the funds were to be spent for narrowly defined purposes. For example, in Marcus v. Kansas, the fee went into a special fund for the administration of the motor vehicle registration program, with excess funds at the end of the year channeled into the state's highway fund. The court held that the funds were primarily regulatory and thus "fees" for purposes of the Tax Injunction Act.[16] The cases in which courts have found placard charges to be taxes were ones in which the funds went for general revenue purposes.[17] As the Texas statute applies the charges toward the cost of the program, the district court erred in holding that the placard funds were a tax and thus within the scope of the Tax Injunction Act.

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[16] Marcus v. Kansas, 170 F.3d at 1311-12. See also Hexom, 177 F.3d at 1138 (holding surcharge was a fee where it went into a general fund but was used to defray costs of program); Thorpe v. Ohio, 19 F. Supp.2d 816, 823 (S.D. Ohio 1998) (same).

[17] See Hedgepeth v. Tennessee, 33 F. Supp. 2d 668, 671-73 (W.D. Tenn. 1998)(funds went into highway fund, general fund, policy pay supplemental fund, trooper safety fund; no evidence of relationship to placard program); Lussier v. Florida, 972 F. Supp. 1412, 1420 (M.D. Fla. 1997) (holding that funds that went to defray costs of program were a "fee;" other funds, which had a mixed revenue raising and regulatory purpose were a tax); Rendon v. Florida, 930 F. Supp. 601, 604 (S.D. Fla. 1996) (holding that the assessment at issue was a tax because it bore no relationship to the cost of regulating the program).

III

We turn to Texas's contention that the ADA regulation at issue exceeds Congress's power under § 5 of the Fourteenth Amendment to abrogate the states' immunity. Texas did not raise this issue before the district court.

Although we are empowered to consider an Eleventh Amendment defense raised for the first time on appeal,[18] we must consider whether Texas's failure to raise the issue below effectively waived its claim to immunity. A state's waiver of immunity must be unequivocal.[19] It may evidence that waiver, however, through action other than an express renunciation. Courts have found waiver in two general varieties of cases: where the state asserted claims of its own[20] or evidenced an intent to defend the suit against it on the merits.[21]

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[18] See Calderon v. Ashmus, 118 S. Ct. 1694, 1697 n.2 (1998).

[19] See Atascadero State Hosp. v. Scanlon, 105 S.Ct. 3142, 3147 (1985).

[20] See, e.g., Dekalb County Div. of Family & Children Servs. v. Platter, 140 F.3d 676, 680 (7th Cir. 1998) (state waived immunity by filing an adversary proceeding in bankruptcy court); Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Auth., 744 F.2d 880, 886 (1st Cir. 1984) (immunity waived where state filed counterclaim and third-party complaint).

[21] See, Hill v. Blind Indus. & Servs. of Maryland, 179 F.3d 754, 763 (9th Cir. 1999) (collecting cases).

The common thread among these cases is that the state cannot simultaneously proceed past the motion and answer stage to the merits and hold back an immunity defense. For example, in Hill v. Blind Industries and Services of Maryland, the state entity waited until the first day of trial to assert its immunity. Disallowing the defense on appeal, the Ninth Circuit noted that the wait allowed the state to have the best of both worlds; it could monitor how the suit was proceeding on the merits but have any adverse ruling set aside on Eleventh Amendment grounds.[22]

Here, Texas's only filing was a motion to dismiss based on the Tax Injunction Act. Texas never filed an answer or participated in any proceedings indicating an intent to try the matter on the merits.[23] Because the district court granted Texas's 12(b)(6) motion, Texas never had occasion to contest its presence in federal court on other grounds. Texas gained no benefit by federal court jurisdiction and did not lead Neinast to believe that it intended to try the case in federal

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[22] 179 F.3d at 756-57.

[23] As such, Texas filed no "pleading" as defined by Fed. R. Civ. P. 12. This fact defeats Neinast's argument that Texas waived immunity by failing to comply with a local district court rule imposing time requirements on immunity claims; those requirements would only have been triggered by the filing of a pleading. See Local Court Rule CV-12 of U.S. Dist. Ct. for Western District of Texas. As the role was not triggered, we need pass no judgment as to whether such local requirements could be evidence of waiver by a state.

court.[24] Texas did not unequivocally waive its right to assert immunity from suit.

Now to the merits of Texas's Eleventh Amendment challenge. The Eleventh Amendment secures the states' immunity from private suits for monetary damages filed in federal court.[25] Congress has the power to abrogate that immunity under § 5 of the Fourteenth Amendment, but only within its remedial powers under § 5.[26]

Whether Congress is exercising its remedial power or impermissibly defining new rights is measured by the Supreme Court's two-part "congruence and proportionality" test. First, there must be evidence from the legislative record or elsewhere that Congress identified a pattern of constitutional wrongdoing. Second, the court must consider whether the provisions are proportional to the remedial goal.[27] In fashioning a remedy for constitutional violations, Congress

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[24] As we hold that Texas did not waive its immunity through its actions, we do not reach the issue of whether the Attorney General was authorized under Texas law to consent to federal court jurisdiction on behalf of the State of Texas. See Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 469 (1945).

[25] See Edelman v. Jordan, 415 U.S. 651,663 (1974).

[26] See Kimel v. Florida Bd. of Regents, 120 S.Ct. 631,644 (2000).

[27] See Kimel, 120 S.Ct. at 645; Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S.Ct. 2199, 2207 (1999).

has latitude to prohibit conduct which in itself is not unconstitutional.[28]

Texas argues that the regulation at issue exceeds Congress's remedial authority under § 5. Circuit precedent bars our consideration of whether the ADA as a whole exceeds Congress's power to abrogate under § 5.[29] Texas, however, presents a different theory: foreclosed from arguing to this court that the entire ADA exceeds the congressional power of abrogation, it contends that we at least must confront whether the regulation exceeds those powers.

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[28] See City of Boerne v. Flores, 117 S.Ct. 2157, 2163 (1997).

[29] See Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir. 1998). It is unclear to what extent Coolbaugh blessed the ADA insofar as it commands access rather than simply barring discrimination, the less problematic issue; we assume without deciding that it found both regulatory thrusts constitutional. We note that Coolbaugh was decided before Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), which held that the Age Discrimination in Employment Act exceeded Congress's abrogation powers and possibly suggests a more vigorous application of the congruence and proportionality test than the Coolbaugh court gleaned from City of Boeme. The Supreme Court has now three times granted certiorari to address the § 5 issue in the ADA context; two cases have settled, and one remains pending. See University of Ala. at Birmingham Bd. of Trustees v. Garrett, 120 S.Ct. 1669 (2000); 68 U.S.L.W. 3649 (April 17, 2000).

Two of our sister Circuits have considered this method and have focused on different lines of analysis. The Fourth Circuit decided in Brown v. North Carolina Division of Motor Vehicles[30] that a challenged regulation must independently meet the proportional and congruent test.[31] The Ninth Circuit looks instead at the statutory scheme as a piece to determine whether it falls under Congress's powers; if it does, the regulation is constitutional and subject to review only under the Chevron[32] standard.[33]

Chevron involves a two-step inquiry. First, the court must address whether Congress has clearly spoken on a precise issue; if it has, then the agency's interpretation must conform to that policy. If it has not, the court moves to the second step, which defers to the agency's policy-making interpretation of the statute unless that answer is arbitrary,

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[30] 166 F.3d 698 (4th Cir. 1999).

[31] See Brown, 166 F.3d at 703-04. Since then, another Fourth Circuit panel upheld the constitutionality of the ADA as a statutory scheme but affirmed the court's authority to pass on the constitutionality of individual regulations. See Amos v. Maryland Dept. of Public Safety & Correctional Serv's, 178 F.3d 212, 221 & n.8 (4th Cir. 1999), reh'g en banc granted, judgment vacated, December 28, 1999.

[32] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[33] Dare v. California, 191 F.3d 1167, 1176 & n.7 (9th Cir. 1999).

capricious, or manifestly contrary to the statute.[34] We are persuaded that in a challenge such as this one, which questions only the power of Congress to regulate the states, not an agency's power to implement by role and interpret congressional mandates, Chevron can suggest the wrong question if we move too quickly to its second step. Whether the Department of Justice has rationally or arbitrarily interpreted the ADA in promulgating the regulation at issue does not answer whether Congress could constitutionally have made a certain policy choice. In making the "step one" inquiry, our operating premise must be that an agency, or as here, an executive office with delegated power to promulgate roles, cannot have greater power to regulate state conduct than does Congress. An agent cannot escape the requirements of proportionality and congruence. At the same time, applying the proportionate and congruent test demands attention to its context. That Congress will not have made findings regarding every discrete topic addressed by individual regulations is the raison d'etre of administrative delegation. An agency's promulgation process will thus not yield a record responsive to the inquiries of City of Boerne in isolation from the statutory scheme under which it operates. We first must consider whether Congress, not the agency, has satisfied City of Boerne in imposing a scheme of regulation upon the states.

If the statute satisfies this initial inquiry, we then measure whether the challenged regulation operates within the

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[34] See Chevron, 467 U.S. at 842-43; Kenneth Culp Davis & Richard J. Pierce, Jr., I Administrative Law Treatise § 3.2 (3d ed. 1994).

remedial compass defined by Congress through valid use of § 5 powers. This means that the agency's action must be proportional and congruent to the relevant constitutional wrongs identified by Congress, not simply to other remedial steps taken by Congress directly. In doing so, we do not detract from Chevron's powerful preference that policy choices be made by the representative branches rather than the judiciary. Rather, we determine only whether the rulemaker has followed the necessary limits of the statute's regulation of the states.

The statute enabling the Department of Justice regulation addresses the denial of access by the states to individuals with disabilities.[35] Following Coolbaugh, we presume that Congress properly identified unconstitutional discrimination by the states in denying access; the support cited by that court includes Congress's finding that:

> [I]ndividuals with disabilities . . . encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architecture, transportation, and communication barriers. . .

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[35] The statutory provision under which the Department of Justice promulgated the role reads: [N]o qualified individual shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132 (2000).

> failure to make modifications to existing facilities. . . .[36]

Assuming that such findings identify unconstitutional conduct by the state, a statutory remedy that ensures access correlates to the relevant harm identified by Congress.

When we turn to the regulation, we find that it falls outside this access-granting remedial scheme and thus beyond the remedial compass Congress could constitutionally authorize against the states. The regulation reads:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of such measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the non-discrimination treatment required by the Act or this part.[37]

The regulation's scope goes further than simply requiring states to provide access to their facilities and programs; it bars the sharing of any costs of such measures, a highly intrusive limit on the core state power to choose revenue sources. There is no plausible claim that banning any fees by the state corrects past discrimination against

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[36] Coolbaugh, 136 F.3d at 435 (quoting 42 U.S.C. § 12101(a)).

[37] 28 C.F.R. 35.130(f) (2000).

individuals with disabilities regarding access or that it seeks prophylactically to prevent the state from intentionally discouraging them from enjoying access. A requirement as to who bears minimal costs of accommodation relates back not to the relevant constitutional harm, but only to other prophylactic steps. We thus distinguish this situation from Congress's ban through the Voting Rights Act on literacy tests, whose use had been shown to be an effort to discriminate.[38]

This degree of separation leaves the regulation unanchored to a constitutional purpose. It is an impermissible form of regulatory creep. The regulation bears such an attenuated relationship to the medial goal that it cannot be understood as a remedial or prophylactic response to unconstitutional behavior. We hold that 28 C.F.R. § 35.130(f) exceeds the scope of Congress's power to abrogate the states' immunity under § 5 of the Fourteenth Amendment. Texas is thus not subject to suit without its consent. We affirm the judgment dismissing this case, albeit on different grounds.

AFFIRMED.

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[38] See Boerne, 117 S.Ct. at 2166-67; South Carolina v. Katzenbach, 86 S.Ct. 803, 808-11 (1966).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed July 26, 1999]

No. A-99-CA-304 JN

NELL NEINAST	)
Plaintiff,	)
	)
v.	)
	)
STATE OF TEXAS, ET AL.	)
Defendants,	)
	)

ORDER

Before the Court is Defendants' Motion to Dismiss filed on June 3, 1999 (Doc. No. 10). Plaintiff filed her Memorandum of Law in Opposition to Defendants' Motion on June 14, 1999 (Doc. No. 12). Upon review of the Motion, the Opposition, the applicable legal authorities and the entire case file, the Court enters the following Order.

Plaintiff filed this lawsuit against the State of Texas Defendants to enjoin the State from imposing a $5 fee for the issuance of or renewal of disabled person parking permit placards. *See* TEX. TRANS. CODE § 681.003(a)(3). Plaintiff

contends that the $5 fee violated the Americans With Disabilities Act ("ADA"). *See* 42 U.S.C. §§ 12101-12213.

Defendants request dismissal of the action pursuant to Federal Rule of Civil Procedure 12(b)(1) on the ground that the federal Tax Injunction Act prevents this Court from exercising subject-matter jurisdiction over the controversy. The Tax Injunction Act provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. The Act appropriately limits the federal judiciary's ability to interfere with the administration of state tax systems. See *Home Builders Ass'n of Mississippi, Inc. v. City of Madison,* 143 F.3d 1006, 1010 (5th Cir. 1998).

The Fifth Circuit has developed a "bifurcated analysis" to determine whether the Act bars federal jurisdiction. *Id.* First, the Court must determine whether Texas Transportation Code section 681.003(a)(3) imposes a tax or merely a regulatory fee. Even if this state law imposes a tax for purposes of the Tax Injunction Act, the Court may decline to exercise jurisdiction if the state courts are equipped to furnish Plaintiff with a plain, speedy, and efficient remedy, *Id.*

Plaintiff obviously argues that the $5 charge for the parking placard imposed by section 681.001(a)(3) is a fee rather than a tax and, thus, the Tax Injunction Act is not

applicable. The state statutory scheme provides that the fees collected under Section 681.003 by the county assessor-collectors will be deposited in the state highway fund to defray the cost of the placards. *See* TEX. TRANS. CODE § 681.005(1). Plaintiff, quoting the *Home Builders* case, argues that the classic fee is linked to a regulatory scheme and is designed to raise money to help defray an agency's regulatory expenses. *See Home Builders,* 143 F.3d at 1011.

Federal law controls the question of what constitutes a "tax" under the Tax Injunction Act. *Id.* at 1011 n. 10; *Tramel v. Schrader,* 505 F.2d 1310, 1314 (5th Cir. 1975). Thus, the state statute's reference to the $5 charge as a "fee" is not relevant to the Court's determination. The Fifth Circuit advised courts to distinguish between a tax and a fee by looking to the statute's function and its source:

> [T]he classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses.

Home Builders, 143 F.3d at 1011. Thus, the term "tax" should be construed broadly, given Congress's goals in promulgating the Tax Injunction Act, which included preventing federal-based delays in the collection of public revenues by the state government. *See Kruger v. The Garden*

District Ass'n, 1999 WI, 262107 *2 (E. D. La. Apr. 30, 1999) (citing *Tramel,* 505 F.2d at 1316).

In this ease, section 681.003 of the Texas Transportation Code looks like a tax under the Tax Injunction Act because it was enacted by the state legislature, rather than by an administrative agency. Further, the state statute's essential purpose is to raise revenue. While the state statute provides that the $5 helps defray the cost of providing the placard, the monies collected under section 681.003(a)(3) are deposited into the general state highway fund. The $5 charge serves no regulatory purpose such as discouraging people from applying for the parking placards. Nothing in the record supports the Plaintiff's assertion that the funds received support the actual costs associated with the placards.[1] Rather, the record indicates only that the monies are deposited into the general highway fund which is spent for the benefit of the entire state.

Plaintiff relies heavily on a recent decision from the Ninth Circuit which held that a similar charge for a disabled

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[1] Judge Sparks of the Western District of Texas considered this exact issue in *Pacetti v. State of Texas,* A-97-CA-692-SS. That Court remanded an ADA challenge to section 681.003 on the basis that the $5 charge was a tax under the Tax Injunction Act. *See* May 25, 1999 Order, Doc. No. 10. The Court is mindful that the State of Texas argued in that case that the Tax Injunction Act was not applicable to section 681.003 because the $5 charge was a fee. While the state's opportunism may be unsettling to some, it does not change the Court's analysis of the issues.

parking permit was a "fee" under the Tax Injunction Act. *See Hexom v. Oregon Dep't of Transportation,* 177 F.3d 1134 (9th Cir. 1999).[2] Regardless, this Court is bound by the Fifth Circuit's *Home Builders* decision. Under *Home Builders*, the Court finds that Plaintiff has not carried its burden to demonstrate subject matter jurisdiction. There is no evidence before the Court showing that the funds collected for the placards are directly used to defray the cost of the program. Rather, the evidence shows that the funds are used in the general highway fund which benefits all citizens of the state. Accordingly, the Court finds that Plaintiff has not carried her burden to demonstrate that section 681.003 is a fee rather than a tax under the Tax Injunction Act.

The Court next considers the available state remedies. State courts are equipped to furnish a plain, speedy and efficient remedy if they provide a procedural vehicle that affords taxpayers the opportunity to raise their federal claims. *Home Builders,* 143 F.3d at 1012. A state's remedy is adequate when it provides the plaintiff with a complete judicial determination that is ultimately reviewable by the United States Supreme Court. *Id.* The Fifth Circuit emphasized that the state remedy "need not be the best

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[2] In fact, there appears to be a conflict among the federal courts on this issue and other courts have held such charges for parking placards to be a "tax" under the Tax Injunction Act. *See Rendon v. State of Florida,* 930 F. Supp. 601 (S.D. Fla. 1996); *Lussier v. State of Florida,* 972 F. Supp. 1412 (M. D. Fla. 1997); *Hedgepeth* v. *State of Tennessee,* 33 F. Supp.2d 669 (W. D. Tenn. 1998).

remedy. . . [i]t need only be adequate." *Alnoa G. Corp. v. City of Houston,* 563 F.2d 769, 772 (5th Cir. 1977).

Here, the Court concludes that the State of Texas would provide Plaintiff with a plain, speedy, and efficient remedy for challenging section 681.003 of the Transportation Code. Federal jurisdiction over ADA claims is concurrent, not exclusive. In fact, the ADA lawsuit with similar claims remanded by Judge Sparks was obviously filed by the Plaintiffs in state court and that matter is pending before the state district court in Travis County.[3] State courts have great experience in the consideration of federal anti-discrimination statutes and the parallel state anti-discrimination act, the TCHRA. Should Plaintiff fail to persuade the state district court that section 681.003 violates the ADA, she may appeal to the Texas Supreme Court, and seek ultimate review in the United States Supreme Court.

Accordingly, because Plaintiff has challenged a "tax" within the meaning of the Tax Injunction Act, and because there is a "plain, speedy, and efficient" remedy available in state court, the Tax Injunction Act bars this Court from exercising jurisdiction over the claims. The Motion to

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[3] Defendants allege that the purported class now before this Court is identical to the purported class remanded by Judge Sparks, and that lawsuit is pending in the 201st District Court of Travis County, *Marjorie Meyers v. State of Texas*, Cause No. 97-09093. It would be an obvious waste of judicial resources for both this federal court and the state district court to consider identical challenges to the state statute.

Dismiss will be granted pursuant to Federal Rule of Civil Procedure 12(b)(1).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss is hereby GRANTED and that Plaintiff's claims against all Defendants are hereby DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that Defendants' Motion for Extension of Time to Respond to Plaintiff's Motion to Certify is hereby DISMISSED AS MOOT.

IT IS FURTHER ORDERED that this cause is CLOSED and that any pending motions are DISMISSED AS MOOT.

SIGNED AND ENTERED this 26th day of July, 1999.

/s/_____
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed July 26, 1999]

No. A-99-CA-304 JN

NELL NEINAST *Plaintiff,*	)
v.	)
STATE OF TEXAS, ET AL. *Defendants,*	)

FINAL JUDGMENT

Before the Court is the above-entitled cause. Based on the Court's Order entered on this date, the Court enters the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's claims against all Defendants are hereby DISMISSED WITHOUT PREJUDICE.

SIGNED AND ENTERED this 26th day of July, 1999.

/s/_____
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed July 31, 2000]

No. 99-50811

NELL NEINAST, *Plaintiff-Appellant,*	)
v.	)
STATE OF TEXAS; TEXAS DEPARTMENT OF TRANSPORTATION; DAVID M. LANEY; ROBERT NICHOLS; JOHN W. JOHNSON; CHARLES W. HALD; JERRY DIKE; VEHICLE TITLES AND REGISTRATION DIVISION, *Defendants-Appellees.*	)

Appeal from the United States District Court
For the Western District of Texas, Austin

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before REYNALDO G. GARZA, HIGGINBOTHAM, and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R.APP.P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED.R.APP.P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed June 26, 2000]

No. 99-50811
D.C. Docket No. A-99-CV-304-JN

NELL NEINAST,
Plaintiff-Appellant,

v.

STATE OF TEXAS; TEXAS DEPARTMENT OF TRANSPORTATION; DAVID M. LANEY; ROBERT NICHOLS; JOHN W. JOHNSON; CHARLES W. HALD; JERRY DIKE; VEHICLE TITLES AND REGISTRATION DIVISION,
Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas, Austin

[Filed in the District Court August 8, 2000]

Before REYNALDO G. GARZA, HIGGINBOTHAM, and BENAVIDES, Circuit Judges.

JUDGMENT

This cause was considered on the record of appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

ISSUED AS MANDATE: August 04, 2000.

(2)

Supreme Court, U.S.
FILED
SEP 15 2000
CLERK

No. 00-0263

In the Supreme Court of the United States

NELL NEINAST, INDIVIDUALLY,
Petitioner,

v.

STATE OF TEXAS, ET AL.
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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1PP

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No. 00-0263

In the

Supreme Court of the United States

NELL NEINAST, INDIVIDUALLY,
Petitioner,

v.

STATE OF TEXAS, ET AL.
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

THE COURT SHOULD HOLD OR DENY THE PETITION

Petitioner correctly identifies a conflict between the Ninth Circuit, which upheld §35.130(f) against Eleventh Amendment challenge, and the Fourth and Fifth Circuits, which have both held to the contrary. *Compare Dare v. California*, 191 F.3d 1167 (CA9 1999), *with Neinast v. Texas*, 217 F.3d 275 (CA5 2000), *and Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698 (CA4 1999). Petitions are now pending in all three cases.[1]

Petitioner also correctly notes that "[s]omebody is wrong," Pet. at 11, but it is not the Fifth Circuit. Rather, it was the

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1. *See Dare, petition for cert. filed*, 68 U.S.L.W. 3566 (U.S. Feb. 24, 2000) (No. 99-1417); *Brown, petition for cert. filed*, 68 U.S.L.W. 3164 (U.S. Sept. 8, 1999) (No. 99-424).

Ninth Circuit's gross misapplication of the *Chevron*[2] doctrine in *Dare* that created the split. The congruence-and-proportionality evaluation conducted by the Fourth and Fifth Circuits correctly presupposes that the regulation is not inherently arbitrary or capricious under *Chevron* and that, but for its inability to satisfy the congruence-and-proportionality test, it would otherwise have the same force and effect as a legislative enactment. In other words, the Fourth and Fifth Circuits treated the regulation as if it were a statute and then determined whether Congress could have constitutionally applied that statute against the states' Eleventh Amendment immunity.

The Ninth Circuit's analysis, on the other hand, would never even examine the constitutionality of the regulation. Instead, it would generally determine only whether the challenged regulation is basically consistent with the statutory purpose under *Chevron* and would go no further. *Dare*'s erroneous application of the *Chevron* test in these circumstances produces absurd results. For instance, inherent in the Ninth Circuit's analysis is the supposition that the Department of Justice can constitutionally promulgate *as a regulation* what Congress lacks power to enact *as a law*. The Ninth Circuit's *Chevron*-based analysis is unsuitable for evaluating an Eleventh Amendment challenge precisely because it measures only compatibility with congressional intent and not whether that intent is constitutionally permissible.

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2. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

The petition for writ of certiorari in this case may appropriately be held pending the Court's resolution of *University of Alabama Board of Trustees v. Garrett*, No. 99-1240. If the Court rules in *Garrett* that Congress lacked authority to abrogate the states' Eleventh Amendment immunity under the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, then the regulations promulgated pursuant to the ADA also lack abrogating power, and it will be unnecessary for the Court to resolve the more limited question presented in this case.

Alternatively, the Court may properly deny the petition even if Court upholds the ADA against Eleventh Amendment challenge. The Fifth Circuit decided this case having previously determined that the ADA validly abrogated the states' Eleventh Amendment immunity. *Coolbaugh v. Louisiana*, 136 F.3d 430 (CA5 1998). Against that backdrop, the Fifth Circuit correctly held that the regulation at issue in this case, 28 C.F.R. §35.130(f), cannot withstand Eleventh Amendment scrutiny because the regulation does not satisfy the congruence-and-proportionality test. Ultimately, then, the proper result in this case does not depend on the Court's resolution of *Garrett* and, although the Court may legitimately hold the petition for *Garrett*, it certainly is not necessary to do so.

CONCLUSION

For these reasons, the Court should hold the petition pending resolution of *Garrett* or, alternatively, should deny the petition.

Respectfully submitted,

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